

## Defending the Media in Satire Cases

Satire is not an easy concept to define. Jonathan Greenberg, in *The Cambridge Introduction to Satire*, manages to summarise the diverse satirical writings of raunchy Restoration-era poets, the author Salmon Rushdie and *New York Times* food critic Pete Wells as all sharing **one key attribute**: "...none of the writing is merely a work of aggression or transgression. They all shape their judgments into an artistic form and blend attack with entertainment."<sup>1</sup> Such combination of attack, art and entertainment – most often for the purposes of lampooning and criticising cultural mores, political norms and public figures – is the best way to conceptualise satire in order to examine its treatment under law.

The European Court of Human Rights ("ECtHR") held in the seminal 2007 case *Vereinigung Bildender Künstler v Austria* that "...satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care."<sup>2</sup>

Despite such strong support for the protections which should be afforded to satire and the satirist, there is little case law which deals with the subject directly – at least in the international legal sphere – other than a handful of cases heard before the ECtHR. However, the international and regional institutions examined in this fact sheet have all deemed, either through their case law or statements of principles, that shocking and offensive speech and art is protected under freedom of expression laws more generally. Satire, which is often shocking or offensive by nature, should therefore be protected in each of the systems discussed below – particularly where it has a political element.

Any defence of satire or satirists should not ignore broader freedom of expression laws, precedents and arguments – particularly in relation to the protection of journalistic and artistic speech and expression. A full examination of these wider issues is beyond the scope of this fact sheet, however.

This fact sheet therefore aims to provide a brief overview of the international and regional standards applicable specifically to satire by analysing the key international and regional human rights law instruments, the decisions of the bodies and authorities entrusted with their interpretation, and important decisions of certain courts.

### I. International Law

#### (i) Human Rights Law Instruments

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<sup>1</sup> J. Greenberg, *The Cambridge Introduction to Satire* (Cambridge, 2019), p.7

<sup>2</sup> *Vereinigung Bildender Künstler v Austria* (no. 68354/01, 25 January 2007), 33

## Universal Declaration of Human Rights ("UDHR")

Article 19 UDHR holds that: "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*"

This is a general right and different categories and methods of expression, such as satire, are not mentioned explicitly. The UDHR is not in itself a legally-binding treaty and no mechanism for its direct legal enforcement exists, either at international or national level. However the UDHR is widely regarded as forming part of customary international law.<sup>3</sup>

## International Covenant on Civil and Political Rights ("ICCPR")

Article 19(1) ICCPR holds that "*everyone shall have the right to hold opinions without interference*". Article 19(2) ICCPR holds that "*everyone shall have the right to freedom of expression*." This includes freedom of expression "*in the form of art*", but again satire is not explicitly mentioned.

Article 19(3) allows for some limitations on the right to freedom of expression. States may restrict the right in manners "*as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public) or of public health or morals.*"

The ICCPR is a legally-binding international treaty. Although there is no international court which enforces ICCPR rights per se, the Human Rights Committee (the "**Committee**") is responsible for monitoring the implementation of the ICCPR by member states and investigating individual complaints.<sup>4</sup>

### (i) Interpretation by the Committee

The Committee is entitled to make General Comments about issues within its remit.<sup>5</sup> General Comment No. 34 (12 September 2011) covers freedom of opinion and expression under Article 19 ICCPR.<sup>6</sup> The Committee has given its unequivocal support for the importance of freedom of opinion (to which member states may not submit

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<sup>3</sup> United Nations Human Rights, Office of the High Commissioner, "Digital Record of the UDHR" <<<https://www.ohchr.org/EN/NEWSEVENTS/Pages/DigitalrecordoftheUDHR.aspx>>> accessed June 2020

<sup>4</sup> Human Rights Committee, <<<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>>> accessed June 2020

<sup>5</sup> *Ibid*

<sup>6</sup> Human Rights Committee, General comment No. 34, CCPR/C/GC/34 12 September 2011 <<<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>> accessed June 2020

reservations)<sup>7</sup> and freedom of expression (all forms and means of dissemination of which are protected).<sup>8</sup> Satire is not mentioned separately as a topic.

The Committee has held that "*all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.*"<sup>9</sup> Where satire is aimed at public and political figures it should therefore be deserving of protection under the ICCPR.

It is also possible for satirical expression to come into conflict with the rights and reputation of others or public morals (see, for example, much of the ECtHR case law). Such rights of others could involve the right to freedom of thought, conscience or religion under Article 18(1) ICCPR or the prohibition of religious hatred in Article 20(2) ICCPR. It is worth noting (especially in light of the attack on satirical magazine *Charlie Hebdo*) that the Committee does not regard it as permissible for restrictions on freedom of expression to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.<sup>10</sup>

#### (i) Statements by UN Special Rapporteurs

The mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (the "**Special Rapporteur**") was established in 1993.<sup>11</sup> Satire is not a topic which has been dealt with explicitly by the Special Rapporteur, but reports have highlighted that views which are offensive or disturbing to a majority are capable of protection<sup>12</sup> – this is particularly relevant where satire has been prohibited on the grounds of public morals. The Special Rapporteur has also emphasised that criminal laws "*may not be used to protect abstract or subjective notions or concepts, such as the State, national symbols, national identity, cultures, schools of thought, religions, ideologies or political doctrines.*"<sup>13</sup> As satire frequently targets such abstract or subjective notions or concepts, this statement supports the idea that satire is a protected category or medium of freedom of expression under the UDHR and ICCPR.

## II. Regional Law

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<sup>7</sup> *Ibid* at 9

<sup>8</sup> *Ibid* at 9

<sup>9</sup> *Ibid* at 38

<sup>10</sup> *Ibid* at 49. The conflict between freedom of expression and the practice of religion is a particular area of concern for the United Nations. The Rabat Plan of Action (A/HRC/22/17/Add.4, 11 January 2013) concludes that notwithstanding the importance of freedom of religion and the prohibition of discrimination under Article 20 ICCPR, a high threshold is still required for criminal restrictions on freedom of expression (at 29).

<sup>11</sup> Commission on Human Rights resolution 1993/45

<sup>12</sup> Report of the Special Rapporteur (E/CN.4/1995/32, 14 December 1994) at 55

<sup>13</sup> Report of the Special Rapporteur (A/HRC/14/23, 20 April 2010) at 84

## (i) European Convention on Human Rights

### Overview

The right to freedom of expression and information is enshrined in Article 10 of the **European Convention on Human Rights ("ECHR")**. **Article 10(1)** sets out the scope of the right: "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and impart information and ideas without interference from public authority.*" Article 10(1) does not distinguish between different types of expression, and satire is not explicitly mentioned. The ECtHR has however developed an extensive case law on the categories and methods of expression protected. Satire has been identified as protected expression – this is identified in detail below.

Article 10(2) limits the right to freedom of expression. It may be "*subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society*" imposed for one of several reasons, including "*the protection of health or morals*" or "*the protection of the reputation or rights of others*". Accordingly, the right to satirical expression cannot be regarded as unlimited.

The ECtHR, in assessing whether such restrictions are necessary in a democratic society (the so-called 'proportionality' test, i.e. "was the aim proportional to the means used to reach that aim?")<sup>14</sup> has given member states a wide margin of appreciation to limit freedom of expression for the protection of morals, particularly in cases involving artistic expression.<sup>15</sup>

Article 10(1) often conflicts with the right to respect for private and family life under Article 8(1) of the ECHR. Although this is most commonly the case in matters of journalistic expression, and the ECtHR will effectively conduct a "balancing" test between the two rights on the facts,<sup>16</sup> it may be relevant where satirical expression has been restricted or criminalised for the protection of the reputation or rights of others.

### Case Law

*Handyside v The United Kingdom* (no. 5493/72, 7 December 1976)

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<sup>14</sup> Dominika Bychawska-Siniarska, "Protecting the Right to Freedom of Expression Under The European Convention on Human Rights: A Handbook for Legal Practitioners" (Council of Europe, July 2017), p.44

<sup>15</sup> *Ibid.* at p.58. See also *Müller and Others v. Switzerland* (no. 10737/84, 24 May 1988).

<sup>16</sup> See, for instance, *Von Hannover v Germany* (no. 59320/00, 24 June 2004) where the ECtHR (at 76) considers that "*the decisive factor in balancing the protection of private life against freedom of expression should like in the contribution that the published [works] make to a debate of general interest.*"

The starting point when considering the issues around restrictions imposed on controversial expression should be the ECtHR's *Handyside* decision.<sup>17</sup>

The case involved a challenge by a man convicted under British obscenity laws of possessing and distributing a 'radical' educational book for adolescents (*The Little Red Schoolbook*). The book dealt with topics such as sex and illicit drug use, and was in wide circulation in continental Europe. The ECtHR ultimately found that there was no violation of Article 10(1). In assessing the proportionality and necessity of the restriction on freedom of expression, it found that morals differ across each member state and that the British authorities consequently enjoyed a wide margin of appreciation to interpret and apply the domestic obscenity laws.<sup>18</sup>

However the ECtHR noted that such margin of appreciate is not unlimited and gave its unequivocal support for the principal of freedom of expression: "*Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.*"<sup>19</sup>

It is clear that even expression which "offends, shocks or disturbs" is subject to protection under Article 10(1) and any restriction thereof must still be proportionate to the aim pursued so as to be necessary in a democratic society.

*Vereinigung Bildender Künstler v Austria* (no. 68354/01, 25 January 2007)

The case involved an injunction granted against the display of a satirical artwork following legal action by a politician from the right-wing Austrian Freedom Party (FPÖ). The artwork, which attracted substantial public attention, depicted FPÖ politicians and other public figures (including Mother Theresa) in various sexual acts and positions.

The ECtHR balanced the personal and reputational interests of the FPÖ politician with the artistic and satirical nature of the work. It found that the injunction, which was unlimited in both time and space, to be disproportionate to the aims pursued (the protection of the reputation and rights of others) and was therefore not necessary in a democratic society.<sup>20</sup>

It gave its support to the *Handyside* principal and emphasised the importance of satirical **works**: "...*satire is a form of artistic expression and social commentary and, by its inherent*

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<sup>17</sup> *Handyside v The United Kingdom* (no. 5493/72, 7 December 1976)

<sup>18</sup> *Ibid* at 48

<sup>19</sup> *Ibid* at 49

<sup>20</sup> *Vereinigung Bildender Künstler v Austria*, supra n.2 at 38

*features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.*"<sup>21</sup>

In considering that the artwork was not intended to depict the politician's private life but rather his public standing, it noted that "*in this capacity [a politician] has to display a wider tolerance in respect of criticism.*"<sup>22</sup> The Court has held on several occasions that political expression and the criticism of politicians is deserving of a particularly high level of protection under Article 10(1).<sup>23</sup> Satirical artwork which is political in nature should therefore be considered to enjoy greater protection than artwork which is merely gratuitous or shocking for artistic purposes alone.<sup>24</sup>

*Eon v. France* (no. 26118/10, 14 March 2013)

A political activist was arrested and convicted with "insulting the President" under a law from 1881 for waving a placard reading "*casse toi pov'con*" ("get lost, you sad prick") at the President.

The ECtHR held that this restriction on freedom of expression, here for the protection of the reputation or rights of others, was not proportionate to the stated aim and was therefore unnecessary in a democratic society.<sup>25</sup> It found that the expression was criticism levelled "*through the medium of irreverent satire*" and reiterated its position from *Vereinigung Bildender Künstler*, noting that the phrase was one which had been used by the French President himself and had become widespread in its humorous use.<sup>26</sup>

It again stressed the importance of political speech: "*there is little scope under Article 10(2) for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest. The limits of acceptable criticism are wider as regards a politician as such than as regards a private individual.*"<sup>27</sup> Satire that has a political element should therefore enjoy a high level of protection under Article 10(1).

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<sup>21</sup> *Vereinigung Bildender Künstler v Austria*, supra n.2

<sup>22</sup> *Vereinigung Bildender Künstler v Austria*, supra n.2 at 34

<sup>23</sup> See for instance *Lingens v Austria* (no. 9815/82, 8 July 1986) at 42: "*Freedom of political debate is at the very core of the concept of a democratic society... The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual*", and although protection of reputation extends to politicians, "*the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.*"

<sup>24</sup> *Müller and Others v. Switzerland* (no. 10737/84, 24 May 1988). The ECtHR emphasised the wide margin of appreciation that states enjoy as regards the protection of morals, and this justified the confiscation of artwork depicting sexual intercourse between men and animals.

<sup>25</sup> *Eon v. France* (no. 26118/10, 14 March 2013), 62

<sup>26</sup> *Ibid* at 60

<sup>27</sup> *Ibid* at 59

*Sinkova v Ukraine* (App. No. 39496/11) [2018] ECHR 39496/11

A Ukrainian artist was arrested and convicted for cooking eggs and sausages over the 'eternal flame' at the Tomb of the Unknown Soldier in Kyiv, in a protest to highlight the wasting of natural gas and the plight of Ukrainian war veterans.

Although the ECtHR reiterated its position from the *Handyside* and *Vereinigung Bildender Künstler* cases, it found that there was no violation of Article 10(1). This was because it was not the act of protest for which the artist was convicted, but the specific and narrow offence of desecrating the war memorial.<sup>28</sup>

Particular regard should be had to the convincing dissenting opinion which focused strongly on the satirical elements of the protest: "*The applicant's satire had done exactly what this art frequently does: it transferred the viewer's attention from an object to its social context.*"<sup>29</sup>

The dissenting judges were critical of the Ukrainian authorities for not taking the satirical purpose of the act into account when charging and convicting the artist. They expressed concern, that by criminalising insults to memory and designating certain spaces off-limits for freedom of expression, that there "*is a real risk of eroding the right of individuals to voice their opinions and protest through peaceful, albeit controversial, means.*"<sup>30</sup>

(i) Inter-American Convention on Human Rights

**The American Convention on Human Rights ("ACHR") evolved from and superseded the American Declaration of the Rights and Duties of Man.** The interpretation and enforcement of the ACHR is entrusted to the Inter-American Court of Human Rights (the "**Inter-American Court**") and the Inter-American Commission (the "**Inter-American Commission**") on Human Rights. The right to freedom of thought and expression is enshrined in Article 13(1) of ACHR: "*Everyone has the right to freedom of thought and expression.*"

Article 13(2) provides that the exercise of the right to freedom of thought and expression shall not be subject to prior censorship. However, liability may be subsequently imposed by law to the extent necessary to ensure (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals.

There is no jurisprudence which explicitly deals with the issue of satire. The Inter-American Court and the Inter-American Commission have however held that the right to freedom of

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<sup>28</sup> *Sinkova v Ukraine* (App. No. 39496/11) [2018] ECHR 39496/11, 108

<sup>29</sup> *Ibid*, dissenting opinion

<sup>30</sup> *Ibid*

thought and expression is broadly construed.<sup>31</sup> Importantly, the following forms and content of expression which may be relevant to satirical expression are protected:

- Artistic and symbolic expression, in all forms;<sup>32</sup>
- Speech which is offensive, shocking, unsettling, unpleasant or disturbing (both to the State or a segment of the population);<sup>33</sup> and
- Political speech and expression related to matters of public interest – public figures are expected to tolerate a higher degree of criticism than ordinary citizens.<sup>34</sup>

The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, in response to the *Charlie Hebdo* attack, has also stated the following: "*As affirmed by international human rights bodies, satirical expression, as forms of speech that may be shocking or unsettling to any sector of the population, are protected by the right to freedom of expression.*"<sup>35</sup> It has also called on the Ecuadorian authorities to refrain from stigmatizing an online satirist where such stigmatization led to concerns over the satirist's physical safety.<sup>36</sup>

#### (i) **African Charter on Human and Peoples' Rights**

Freedom of speech and information in Africa is protected by Article 9 of the African Charter on Human and People's Rights ("African Charter"). In particular, Article 9(2) of the African Charter provides that: "*Every individual shall have the right to express and disseminate his opinions within the law.*"

Notably, the right must be exercised "*within the law*". This is a different wording from the other instruments examined, which all provide that the right to free expression may be exercised freely subject to certain lawful requirements. There is no requirement within the text of the African Charter for restrictions on the right to free expression to be necessary for set purposes such as protecting the rights or reputation of others or on the grounds

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<sup>31</sup> Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, "Inter-American Legal Framework regarding the Right to Freedom of Expression", 30 December 2009, 5

<sup>32</sup> *Ibid* at 26

<sup>33</sup> *Ibid* at 31. See also I/A Court H. R., Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 113

<sup>34</sup> *Ibid* at 35

<sup>35</sup> Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, Press Release R 2/15 <<<https://www.oas.org/en/iachr/expression/showarticle.asp?artID=972&IID=1>>> accessed June 2020

<sup>36</sup> Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, Press Release R 17/15 <<<https://www.oas.org/en/iachr/expression/showarticle.asp?artID=979&IID=1>>>, accessed June 2020



of public morals. However, the African Commission on Human and Peoples' Rights (the "**African Commission**") has held in its Declaration of Principles on Freedom of Expression in Africa that "*any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.*"<sup>37</sup>

The African Charter is enforced by the African Commission and the African Court on Human and Peoples' Rights (the "**African Court**"). The African Court has ruled on freedom of expression in several cases concerning;<sup>38</sup> the intimidation and assassination of journalists;<sup>39</sup> criminal defamation;<sup>40</sup> the Rwandan Genocide;<sup>41</sup> and libel, sedition and false news.<sup>42</sup> Satire has not been examined directly in the African Court's jurisprudence to date.

The Special Rapporteur on Freedom of Expression and Access to Information in Africa has emphasised the need for any restrictions on freedom of expression to be prescribed by law, serve a legitimate aim and be necessary and proportionate to achieve that aim in a democratic society.<sup>43</sup> Such legitimate aims may be the protection of the reputation or rights of others or the protection of public morals.<sup>44</sup> Although satire is not explicitly covered, the draft report provides that: "*States shall not prohibit or impose civil or criminal sanctions in respect of speech that merely lacks tolerance, civility and respect for the rights of others or that offends, shocks or disturbs.*"<sup>45</sup>

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<sup>37</sup> Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 – 23 October, 2002: Banjul, The Gambia, at para II

<sup>38</sup> A useful summary of the following cases is available on the UNESCO website << [https://en.unesco.org/sites/default/files/african\\_courts\\_decisions\\_final\\_eng\\_1.pdf](https://en.unesco.org/sites/default/files/african_courts_decisions_final_eng_1.pdf)>> accessed June 2020

<sup>39</sup> *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v Burkina Faso* (App. No. 013/2011, 28 March 2014), *Deyda Hydara Jr, Ismaila Hydara & International Federation of Journalists Africa v Republic of the Gambia* (App. No. 030/11), 10 June 2014)

<sup>40</sup> *Lohe Issa Konate v. Burkina Faso* (App. No. 004/2013, 5 December 2014)

<sup>41</sup> *Ingabire Victoire Umuhoya v. Republic of Rwanda* (App. No. 003/2014, 24 November 2017)

<sup>42</sup> *Federation of African Journalists, Fatou Camara, Fatou Jaw Manneh, Alhagie Jobe and Lamin Fatty v The Republic of the Gambia* (App. No. 036/15, 13 March 2018)

<sup>43</sup> Declaration of Principles on Freedom of Expression and Access to Information in Africa, "Draft issued by the Special Rapporteur on Freedom of Expression and Access to Information in Africa", 30 April 2019, 10

<sup>44</sup> *Ibid* at 11

<sup>45</sup> *Ibid* at 51

### III. Further Reading

[United Nations Human Rights, Office of the High Commissioner, "Freedom of Opinion and Expression – Issues in Focus"](#)

[The Immanent Frame, "Satire and policing the boundary of free expression"](#)

[Paul Sturges, \*Limits to Freedom of Expression? Considerations Arising From the Danish Cartoons Affair\*, IFLA Journal 32 \(2006\) 181-188](#)

[Kwanghyuk Yoo, \*When Does Cultural Satire Cross the Line in the Global Human Rights Regime?: The Charlie Hebdo Controversy and its Implication for Creating a New Paradigm to Assess the Bounds of Freedom of Expression\*, 42 Brook. J. Int'l L. 761 \(2018\).](#)